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In the

Supreme Court of the United States

CITY OF LOVELAND, OHIO,

Petitioner,

v.

BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Patricia A. Millett
AKIN, GUMP, STRAUSS, HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
T: (202) 887-4450

R. Guy Taft
Franklin A. Klaine, Jr.
Joseph J. Braun
STRAUSS & TROY
Federal Reserve Building
150 East Fourth Street
Cincinnati, Ohio 45202
T: (513) 621-2120

Stephen P. Samuels
Counsel of Record
Nicole R. Woods
SCHOTTENSTEIN, ZOX & DUNN, Co., LPA
250 West Street
Columbus, OH 43215
T: (614) 462-2700
ssamuels@szd.com

Counsel for Petitioner

January 25, 2011

Becker Gallagher · Cincinnati, OH · Washington, D C. · 800 890 5001

QUESTIONS PRESENTED

I. Whether a state law claim raises a substantial federal question such that the action "arises under" federal law when the question does not require the determination of an important and disputed point of federal law, but instead entails only the application of settled federal law to the specific facts of the state-law case.

II. Whether a state-court defendant can evade the well-pleaded complaint rule, which prohibits removal based on a federal defense or counterclaim, by filing an original declaratory judgment action in federal court after the state-court action has commenced seeking preemptive adjudication of the federal defense or counterclaim.

III. Whether the potential impact of adjudication of a state-law claim on a federal court consent decree constitutes a federal question sufficient to create federal jurisdiction under 28 U.S.C. § 1331.

IV. Whether this Court should grant review to decide the question reserved in *Taylor v. Sturgell*, 553 U.S. 880 (2008): whether a non-party is bound by a federal judgment based solely on conduct that induced reliance by parties to that judgment.

PARTIES TO THE PROCEEDINGS IN THE SIXTH CIRCUIT

Petitioner is the City of Loveland, Ohio, which was the defendant in district court and appellant in the court of appeals.

Respondents are the Board of Commissioners of Hamilton County, Ohio, which was a plaintiff in district court and appellee in the court of appeals. The City of Cincinnati, Ohio, was an intervenor-plaintiff in the district court and appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The City of Loveland, Ohio, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 621 F.3d 465. The district court's opinion (App., *infra*, 21a-35a) is not reported.

JURISDICTION

The court of appeals entered its judgment on September 15, 2010. A timely petition for rehearing was denied on October 27, 2010 (App., *infra*, 36a-37a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1331 of Title 28 of the United States Code provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Section 1441(b) of Title 28 of the United States Code provides:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or

> right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

Around 1970, petitioner, the City of Loveland, Ohio, placed its wastewater treatment plant and sewers (collectively, the "Polk Run System") into service. (App., *infra*, 3a.) In 1985, Loveland and the Board of Commissioners of Hamilton County, Ohio ("Board") entered into an agreement pursuant to which the Board was to maintain, repair, and operate the Polk Run System (the "1985 Agreement"). (App., *infra*, 3a.) The 1985 Agreement does not have an explicit termination date.

In 2002, the United States Environmental Protection Agency and two state regulators filed a complaint against the Board and the City of Cincinnati under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, because of frequent overflows in the numerous sewer systems (including Polk Run) operated by the Board. (App., *infra*, 3a-4a.) *United States v. Bd. of County Comm'rs, et al.*, No. 1:02-cv-00107 (S.D. Ohio) That action was resolved by a pair of consent decrees. (App., *infra*, 4a.) Loveland was not a party to that litigation or either of the resulting consent decrees. Notice of the lodging of the proposed decrees was published in the Federal Register on December 9, 2003. 68 Fed. Reg. 68651-02 (Dec. 9, 2003). The

Notice did not mention the Polk Run System, the 1985 Agreement, Loveland, or any limitations on Loveland's authority over its sewer system. *Id.*

On October 29, 2008, Loveland notified the Board it was terminating the 1985 Agreement effective December 31, 2009 (App., *infra*, 5a) because, *inter alia*, the Board planned to charge Loveland residents tens of millions of dollars to remediate other wastewater treatment plants and sewer systems that provide no services to Loveland residents. On the same date, Loveland filed a complaint against the Board in the Court of Common Pleas for Clermont County, Ohio. (App., *infra*, 5a.) Loveland requested (1) a declaratory judgment that its notice of termination of the 1985 Agreement was reasonable, and (2) an order that the Board must return control and operation of the Polk Run System to Loveland no later than January 1, 2010. (App., *infra*, 5a.)

The Board did not attempt to remove Loveland's action to federal court under 28 U.S.C. § 1441. Instead, six weeks after Loveland initiated its state-court action, the Board filed a complaint against Loveland in the United States District Court for the Southern District of Ohio. (App., *infra*, 6a.) The Board's complaint sought a declaratory judgment that Loveland could not terminate the 1985 Agreement. (App., *infra*, 5a.) Although the complaint named the EPA and the two state regulatory agencies as defendants, the complaint was explicit that "the Board is not seeking relief from the Regulators." (Dist. Ct. ECF Doc. No. 1, ¶ 20.)

The court denied Loveland's motion to dismiss for lack of jurisdiction, holding that it had jurisdiction

under both 28 U.S.C. § 1331 and the All Writs Act, 28 U.S.C. § 1651. (App., *infra*, 6a.) On the Board's and Cincinnati's motion, the district court then consolidated the Board's action with the consent decree case. (App., *infra*, 23a.) A month and a half later, on July 27, 2009, the Board voluntarily dismissed the EPA and the Regulators without prejudice. (Dist. Ct. ECF Doc. No. 364.)

The district court subsequently granted the Board and Cincinnati's motion for judgment on the pleadings, holding that Loveland's effort to terminate the 1985 Agreement constituted a "collateral attack on the Consent Decrees." (App., *infra*, 30a.) The court held that, although Loveland was not a party to either the consent decrees or the litigation that produced them, Loveland was collaterally estopped from exercising its state law right to terminate a contract. (App., *infra*, 32a.)

The court of appeals affirmed. (App., *infra*, 1a-20a.) The court first held that the district court had jurisdiction because, in its view, the putative impact that Loveland's termination of the 1985 Agreement would have on the consent decrees raised a federal question because the complaint "requests that the district court enforce its consent decree." (App. *infra*, 12a.)

The court also held that the case raised a substantial federal question within the meaning of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). The court reasoned that Loveland's state-law contract claim, if granted, might require a modification of the consent decrees. (App., *infra*, 13a.) The court then

held that the potential impact of that hypothesized ruling transformed the state-law contract issue into a disputed federal question. (App., *infra*, 11a-12a.) The court of appeals further held that the complaint raised a substantial federal question because a federal agency was a party to the consent decree and the consent decree sought to enforce a federal statute. (App., *infra*, 13a.) The court then concluded that the exercise of jurisdiction would "not disturb any congressionally approved balance of federal and state judicial responsibilities." (App., *infra*, 14a.) "[S]ince federal consent decrees are at issue," the court explained, "it would make sense to have that court also resolve any issues that have a direct impact on the implementation of those consent decrees." (App., *infra*, 14a.) Finally, the court held that "Loveland's contention that it is not bound by the consent decree, while accurate, is immaterial" to the jurisdictional question. Because Loveland had not commented on the proposed decree when notice was published in the federal register, "Loveland forfeited its right to challenge" the effects of the consent decrees on it and thus similarly forfeited any state-law right to terminate its contract. (App., *infra*, 17a.)

REASONS FOR GRANTING THE WRIT

Five years after this Court characterized the decisions in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) as being poles apart, the circuit courts are in conflict over which cases present *Grable*-like "nearly pure" questions of federal law appropriate for resolution by federal courts, and which present *Empire*-like legal questions

that are fact-specific, to be decided by state courts. Three circuits interpret *Empire* as having added gloss to the substantial federal question analysis articulated in *Grable*, and require the substantial federal question to be one of interpretation. Other circuits, including the Sixth Circuit in this decision, do not so understand *Grable* and *Empire*, and have held that a "substantial" federal question is present any time a case requires the mere application of some federal law to the facts.

In addition, the Sixth Circuit's decision is at war with this Court's longstanding limitations on federal court jurisdiction—limitations that are critical to enforcing the federalism balance and limited role of Article III courts prescribed by the Constitution. This Court has long held that two basic canons limit the universe of state-court cases that can be removed to federal court: (i) cases may be removed only if federal courts could have exercised original jurisdiction over the action; and (ii) courts will look only to the state-court plaintiff's well-pleaded complaint to determine if *it* presents a federal question. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A federal defense is not part of the complaint and, therefore, removal of an action from state court may not be premised on such grounds. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 7 (1983). Nor will an actual or anticipated federal counterclaim establish "arising under" jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002).

The Sixth Circuit has cast all of those limitations aside by holding that, rather than remove a case, a state-court defendant can simply file a federal defense as a declaratory judgment action, and that filing will

create the federal court jurisdiction that this Court's removal jurisprudence forecloses. This Court's review is needed to prevent that end run of longstanding federalism-based constraints on federal court jurisdiction.

Another question raised by the Sixth Circuit's decision is whether federal question jurisdiction can be predicated on nothing more than the impact that adjudication of a state-law claim might have—depending on how the state court rules—on a federal consent decree. In *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), the Court held that the alleged preclusive effect of federal *judgments* on state-court actions does not raise a federal question. This Court has recognized, however, that federal consent decrees are different: sometimes considered a "judgment," other times labeled a "contract." *Firefighters Local No. 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986). This case raises the still-undecided question, on which the circuits have adopted irreconcilable positions, whether the potential interference of a state-law claim with a federal *consent decree* raises a federal question for purposes of 28 U.S.C. § 1331. The Seventh Circuit says it does not. *In re the Application of County Collector*, 96 F.3d 890 (7th Cir. 1996). But the Sixth Circuit held here that it did, and the Fifth Circuit appears to agree. *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 494 (5th Cir. 2002).

Finally, this case squarely presents the question that the Court has "never had occasion to consider": whether, and if so, under what circumstances, a non-party may be bound by a judgment in litigation to which it was not a party "through conduct inducing

reliance on others." *Taylor v. Sturgell*, 553 U.S. 880, 894 n. 7 (2008). In the present case, the Sixth Circuit ruled that Loveland, although not a party to the litigation that produced the consent decrees, was collaterally estopped from exercising its state-law right to terminate its contract with the Board because the Board and the other parties to the decrees relied to their detriment on Loveland's silence after notice of the consent decrees was published in the Federal Register.

I. THE COURT OF APPEALS' CREATION OF FEDERAL COURT JURISDICTION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS IN TWO RESPECTS AND SCRIPTS AN END RUN OF THIS COURT'S LONGSTANDING REMOVAL JURISPRUDENCE.

The Sixth Circuit's decision presents three significant jurisdictional issues this Court needs to address. First, it adds to the split between the circuits whether the application of federal law to a state law cause of action is sufficient to confer federal court jurisdiction. Second, the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court: whether a state court defendant can create federal jurisdiction by filing a declaratory judgment action in federal court that raises a federal defense to a currently-pending state law claim. Finally, the court's holding that a federal consent decree—and specifically, adverse impact on the decree—provides a sufficient basis for federal question jurisdiction is in direct conflict with the law of the Seventh Circuit.

A. The Rule of Law Created By The Sixth Circuit And Federal Circuit Conflicts With The Law Of The Ninth, Seventh, and Fifth Circuits Regarding Whether Mere Application Of Federal Law To The Facts Of A State-Law Cause Of Action Presents A Substantial Federal Question.

It is a fundamental principal that federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). They possess only the jurisdiction conferred on them by the Constitution or Congress, and it cannot be expanded by the judiciary. *Id.* A federal court is presumed to be without jurisdiction over an action, and the burden of establishing jurisdiction rests with the party wishing to enter federal court. *Id.*

Congress, under 28 U.S.C. § 1331, granted district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." One basis for federal question jurisdiction is the presence of a "substantial federal question." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983). A state-law cause of action that turns on a substantial question of federal law presents federal courts with subject-matter jurisdiction over the state-law claim. *Id.*

This Court has held that there is no "single, precise, all-embracing test" to be used in determining whether a state-law cause of action raises a substantial federal question. *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). However, woven through the fabric of this Court's decisions is the understanding that "the mere

presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). In order to "arise under" a federal law, a genuine and substantial controversy must exist regarding the meaning or interpretation of a federal law. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936). A mere federal issue "lurking in the background" will not suffice. *Id.* at 117.

Grable and *Empire* are the latest pronouncements by this Court on the subject. In *Grable*, the Court articulated the issue as whether "a state law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. Finding the only contested issue in plaintiff's state-law action involved an interpretation of an important issue of federal law, the Court held the matter belonged in federal court. However, in *Empire,* as in *Gully* and *Merrell Dow* before it, the Court found federal jurisdiction lacking. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). Contrasting the issue presented in *Empire* with the "poles apart" one found in *Grable*, the Court stated: "Grable presented a nearly 'pure issue of law,'" whereas *Empire*'s situation was "fact-bound and situation-specific." *Id.* at 700-01. Although that statement differentiated these two cases, circuit courts have issued conflicting rules of law for determining when the role of federal law is "substantial" under those precedents.

The Ninth, Seventh, and Fifth Circuits have interpreted the Court's decisions as creating a jurisdictional distinction between state law claims that require the determination of an important issue of federal law versus those that involve the application of settled federal law to the facts of the case. Two circuits, including the Sixth Circuit in the decision below, have held that *Grable* does not so limit federal jurisdiction. In these circuits, *Grable* does not stand for the proposition that only pure issues of law or claims involving construction of federal law belong in federal court. These courts found federal jurisdiction existed where a state law claim would involve the mere application of federal law to facts.

The Ninth Circuit refused to find federal jurisdiction in a state-law cause of action involving a federally regulated collective bargaining agreement. *Int'l Union of Operating Eng'rs v. County of Plumas*, 559 F.3d 1041 (9th Cir. 2009). The court explained that no substantial federal question existed because the case did "not turn on a construction of a federal law. Rather, it [was] influenced by an application of federal law to the arbitration clause." *Id.* at 1045.

The Seventh Circuit similarly denied jurisdiction over a state-law tort action involving the mere application of federal aviation regulations. *Bennett v. Sw. Airlines Co.*, 484 F.3d 907 (7th Cir. 2007). The meaning of federal statutes or regulations "play[ed] little or no role." *Id.* at 909. Instead, the case involved "fact-specific application of rules that come from both federal and state law, rather than a context-free inquiry into the meaning of a federal law." *Id.* at 910.

Finally, the Fifth Circuit held federal jurisdiction was lacking over a state-law claim for legal malpractice filed in state court that arose out of alleged malpractice in a federal trademark case. *Singh v. Duane Morris LLP*, 538 F.3d 334 (7th Cir. 2008). In order to present a successful claim for malpractice, the plaintiff would have to prove his underlying (federal) cause of action would have been meritorious but for the malpractice. *Id.* at 337. However, because the case did not directly present a question involving the interpretation of federal law, but only one that required the application of federal law to the underlying factual argument, the court held that no substantial federal question was presented.[1] *Id.* at 340.

The Federal and Sixth Circuits have taken the opposite tack, one that would allow significantly more cases into federal court. Faced with facts almost identical to those the Fifth Circuit confronted in *Singh*, the Federal Circuit came to a contrary conclusion. *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 504 F.3d 1262 (Fed. Cir. 2008). Opining that *Grable* did not stand for the proposition that only pure issues of law or claims involving construction of federal law belonged in federal court, the court held that federal jurisdiction existed over a state-law legal malpractice claim because it would involve the application of federal patent law to the facts of the

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[1] *See also* Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 In L J 309 (2007)

predecessor case to determine whether malpractice had been committed. *Id.* at 1269.[2]

The Sixth Circuit's decision that federal jurisdiction existed in this case is also predicated on nothing more than the straightforward application of putative federal law to the particular facts of this case. According to the court, the federal issue is whether Loveland "may [] terminate the 1985 Agreement in its entirety because of the consent decree." (App., *infra*, 11a.) Even granting the court's assumption that the consent decree is a federal law that presents a federal issue, the court's statement makes clear that the question presented is not "what do federal consent decrees mean," or "what do Clean Water Act consent decrees mean," or even "how should a specific paragraph or section of a broad spectrum of Clean Water Act consent decrees be interpreted," but how this particular consent decree should be applied to the facts of this case.

The split among the circuits is outcome determinative. Had the Sixth Circuit applied the threshold determination whether the state law claim involves merely application of federal law, or a substantial and disputed interpretation of federal law—as the Fifth, Seventh, and Ninth Circuits do—it

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[2] The fact that federal court jurisdiction in *Air Measurement* derived from 28 U.S.C. § 1338 instead of § 1331 "is of no moment because in *Christianson*, the Supreme Court grafted § 1331 precedent onto its § 1338 analysis and held that the phrase 'arising under' has the same meaning in § 1338 as it does in § 1331. . ." *Id* at 1271 (*citing Christianson v. Colt Indus. Operating Corp* , 486 U.S. 800, 808-09 (1988))

would have denied federal jurisdiction. This Court's review is required in order to resolve this conflict.

B. The Sixth Circuit Has Decided an Important Issue of Federal Law That Has Not Been, But Should Be, Settled By This Court To Prevent The Wrongful Intrusion Of Federal Court Jurisdiction Into The States' Domain.

By upholding federal-court jurisdiction, the Sixth Circuit has mapped out a jurisdictional end run of this Court's precedent that would otherwise sharply constrain the ability of defendants to litigate their federal defenses to state-law claims in federal court. As discussed below, this Court has made clear that neither a federal defense nor a federal counterclaim supports federal removal jurisdiction. The Sixth Circuit's decision circumvents that law by inviting state-court defendants to run into federal court with declaratory judgment actions that seek federal court adjudication of their defenses to state-court actions and federal foreclosure of the state-law claim.

The "jurisdictional structure at issue in this case has remained basically unchanged for [more than a] century." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 7 (1983). An action filed in state court may be removed to federal court only if federal courts could have exercised original jurisdiction over the action. 28 U.S.C. § 1441. Another key part of the jurisdictional structure is the well-pleaded complaint rule, which provides that federal jurisdiction exists only where a "federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475

(*quoting Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)). These two basic tenets of federal jurisdiction serve the important role of avoiding potentially serious federal-state conflicts. *Franchise Tax Bd.*, 463 U.S. at 9-10.

When determining whether a state court case may be removed, a defense is not part of the properly pleaded complaint. Because a plaintiff is "master of the complaint," the plaintiff can choose a state court forum by abandoning any federal causes of action. *Caterpillar Inc.*, 482 U.S. at 398-99. Therefore, an action cannot be removed on the basis of a federal defense. *Franchise Tax Bd.*, 463 U.S. at 10. An actual or anticipated federal counterclaim also cannot form the basis of removal jurisdiction. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002).

The well-pleaded complaint rule does not cease to apply because the action is one for declaratory judgment. *Franchise Tax Bd.*, 463 U.S. at 16. Just as a case cannot be removed based on a federal defense to a state-law claim, a declaratory judgment action cannot proceed based on a defense to an impending or threatened state court action. *Franchise Tax Bd.*, 463 U.S. at 16 (*citing Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950)). "Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Public Svc. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952). Therefore, the well-plead complaint rule requires jurisdiction to be determined by looking at the nature of the underlying claim, not the declaratory judgment complaint. *Id.*

The Sixth Circuit decision has circumvented that. In direct defiance of *Wycoff*, the court of appeals has allowed the hijacking of state-court claims filed in state-court by "one [actually] a defendant" just because it went "to federal court to begin his federal-law defense [after] the state-court beg[an] the case." *Id.* Permitting the Sixth Circuit decision to stand thus would allow state defendants to create "arising under" jurisdiction out of their state-court defenses just by filing a declaratory judgment action *after* the state litigation has commenced. If a defendant cannot create "arising under" jurisdiction by raising a federal counterclaim, surely the same defendant cannot create jurisdiction by filing that counterclaim as an original declaratory judgment complaint after the state-law action has commenced. If, as the Sixth Circuit has ruled, nothing more than a reformulation or relabeling of paperwork suffices to create federal jurisdiction, its decision will emasculate this Court's removal jurisprudence, which has long-stood as a substantive federalism-rooted constraint on federal jurisdiction.

Here, simply put, Loveland wants to exercise its contractual rights under the 1985 Agreement and the Board wants to prevent it from doing so. Had the Board sought to remove Loveland's complaint to federal court, the lack of federal jurisdiction would have been self-evident under this Court's precedent. Relabeling the removal petition as a declaratory judgment complaint should not change the jurisdictional answer. But by ignoring the pending state-court action that spawned the defensive federal declaratory judgment action, the Sixth Circuit bestowed federal court jurisdiction over ordinary state-law contract claims, and blew a hole in this Court's

careful balance of state and federal jurisdictional interests.

This case presents the Court with the opportunity to settle an important point of law unaddressed by *Skelly Oil*, *Wycoff*, and *Franchise Tax Board*: whether a defendant to a *currently pending* state court action can avoid the interplay between the well-pleaded complaint rule and removal requirements by filing its federal defense or federal counterclaim as an original federal declaratory judgment action in order to circumvent this Court's strict limitations on removal jurisdiction.

Absent this Court's intervention, the jurisdictional structure providing protection to federal-state comity will buckle under the Sixth Circuit's significant expansion of federal jurisdiction. Federal courts will step on the toes of the "rightful independence of state governments," *Holmes Group, Inc.*, 535 U.S. at 831, extending federal judicial power well beyond that which the Constitution, Congress, and this Court's precedent permit.

C. The Sixth Circuit's Decision Contradicts The Law Of The Seventh Circuit Regarding Whether Federal Question Jurisdiction Exists When There Is An Adverse Impact On A Federal Consent Decree.

In this case, the Sixth Circuit found that possible interference with a prior federal consent decree creates federal question jurisdiction. This holding directly contradicts the Seventh Circuit and necessitates this Court's review. The Sixth Circuit's opinion assumes

both that a federal consent decree is a "federal law" for purposes of 28 U.S.C. § 1331, and that the impact of a state-law claim on a consent decree raises a federal question. Neither of these questions has been directly addressed by this Court.

In *In re the Application of County Collector*, 96 F.3d 890 (7th Cir. 1996), the plaintiffs filed a complaint in state court against a school district, claiming the school district levied taxes against plaintiff's property in violation of state law. The taxes were levied as a result of a consent decree entered in a prior federal lawsuit involving the school district. The consent decree permitted the school district to levy taxes in order to fund remedial measures aimed at the school board's prior segregation and discrimination. The school district removed plaintiffs' complaint, arguing the complaint presented a federal question because the action could "effectively frustrate the school district's implementation of the consent decree" by drying up its sources of funds. *Id.* at 892.

The Seventh Circuit disagreed. "Contrary to the school district's position, a state law claim does not present a federal question merely because it impacts the terms of a federal consent decree." *Id.* at 897. Moreover, no federal question jurisdiction existed merely because the taxes at issue were levied pursuant to and in compliance with the decree. *Id.* at 899. Consent decrees are part judgment and part contract, so "it is the agreement of the parties, rather than the force of law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id.* (*quoting Firefighters Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522 (1986)) (original emphasis removed). Therefore, even though the

litigation leading to the consent decree was clearly based on federal law, the consent decree did not itself become a federal law. *Id.*

Although this Court has addressed related issues in connection with settlement agreements and federal judgments since *County Collector*, it has yet to decide whether an adverse impact on a federal *consent decree* presents a federal question.[3] Such decrees are neither contracts nor judgments; they contain attributes of both, which has resulted in them being treated differently for different purposes. *Firefighters Local No. 93*, 478 U.S. at 519 (*quoting United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n. 10 (1975)). Remaining unanswered by the Court is whether, in light of the hybrid nature of consent decrees, an adverse impact on them confers federal jurisdiction.

This case squarely presents that issue to the Court. The Sixth Circuit found federal question jurisdiction because Loveland attempted to terminate the 1985 Agreement, which would allegedly impact the consent decrees due to the "removal of property, the Polk Run Segment, from the consent decree obligations." (App., *infra*, 11a.) The consent decree was created by agreement between the Board and the other parties to

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[3] In *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002), the Court determined that a federal question is not presented when a party to a state-court action violates the terms of a *settlement agreement* it entered into in a prior federal case. Additionally, the assertion that state-court claims brought by a non-party to the previously litigation are completely precluded due to a prior *federal judgment* does not present a federal question either. *Rivet*, 522 U.S. at 476.

the consent decree; it was *not* created by the Clean Water Act. Therefore, although the litigation that begat the consent decree was based on federal law, the consent decree itself is not a federal law upon which the district court could predicate federal question jurisdiction. By the same token, the potential that a judgment in Loveland's state court action might have an adverse impact on the consent decree does not raise a federal question.

The Sixth Circuit's decision cannot be reconciled with the Seventh Circuit. Given the conflict between the two circuits concerning the jurisdictional effect of an adverse impact on a federal consent decree, this Court's review is required to ensure uniformity in federal law. Doing so will enforce proper federalism constraints on federal court jurisdiction and interference with pending state court litigation.

II. THE SIXTH CIRCUIT'S DECISION PRESENTS AND WRONGLY RESOLVES A QUESTION RESERVED BY THIS COURT CONCERNING WHETHER DUE PROCESS PERMITS A NON-PARTY TO BE BOUND BY A FEDERAL JUDGMENT SOLELY BECAUSE ITS CONDUCT ALLEGEDLY INDUCED RELIANCE ON THAT JUDGMENT.

Generally, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also, Richards v. Jefferson County*, 517 U.S. 793 (1996). This rule, however, is tempered by exceptions, one of which is that "a person who agrees to be bound by the determination of issues in an action

between others is bound in accordance with the terms of his agreement." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (*quoting* Restatement (Second) of Judgments § 40 (1982)). In *Taylor*, this Court reserved the question about the scope of this "agreement," specifically whether and under what circumstances a "nonparty may be bound [by a judgment in litigation to which he was not a party] . . . through conduct inducing reliance on others." *Id.* at 894 n.7. The Sixth Circuit's decision now squarely presents that question for this Court's review.

In the instant case, the Sixth Circuit cited the following "facts" as being sufficient to preclude Loveland from bringing an action to terminate the 1985 Agreement: Loveland's putative knowledge of the previous litigation and consent decrees, Loveland's five-year delay (after the consent decrees were entered) in filing its complaint in state court, the Board's (and other parties to the original litigation) purported reliance on Loveland's silence, and the adverse impact on the consent decrees if Loveland's contact claim was successful.

There are any number of parameters that courts might select from in determining whether a non-party's conduct should preclude it from asserting a claim relating to the subject matter of the action. The Restatement enumerates eight possibilities,[4] and this

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[4] The Restatement lists whether the non-party could have been, or should have been, made a party to the earlier action—which is the procedure the *Wilks* Court suggested the original litigants should have followed to bind the *Wilks* plaintiffs (and thereby preclude the subsequent litigation), whether and to what extent the non-party may be responsible for the fact the earlier action

Court identified two others in *Martin v. Wilks*, 490 U.S. 755 (1989) *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(n). In *Wilks*, the Court observed, "questions about the adequacy and timeliness of [the non-party's] knowledge [of the previous suit] would inevitably crop up." *Id.* at 768. This case raises two important questions: is reliance-inducing conduct a basis for non-party claim preclusion and, if so, what are the criteria on which the courts should base their decision.

These questions are lurking behind significant numbers of consent decrees, and pose a potential obstacle to myriad persons whose rights are affected by the implementation of those decrees. Until *Wilks*, the ability of such persons to have their own day in court to vindicate their legal rights was, for the most part, summarily denied by the federal courts on the ground that suits by such persons constituted

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went to judgment without the non-party's claim being made known; whether the assertion of the claim will disrupt the resolution of the controversy apparently achieved by the judgment between others; whether the delay by the non-party in asserting its claim would work unjust hardship on a person who has already litigated related issues with another party; whether the non-party's conduct has justifiably led to the supposition that the non-party has no claim or will govern its conduct according to the outcome of the litigation between others, what the relationship is among the parties; whether and to what extent there is an identity of interests between the non-party and the previous litigants, what the purpose and effect was of the prior litigation; and what opportunity and duty the non-party had to clarify any ambiguity about its position. Restatement (Second) of Judgments § 62 (1982).

"impermissible collateral attack[s]" on the decrees.[5] *Id.* at 762. Because of that broad brush, the courts did not need to analyze the circumstances of the individuals who were bringing the suits or the effects of the new litigation on the parties to the decrees to determine whether collateral estoppel should apply, but an examination of those cases reveals that the questions identified in the Restatement and in *Wilks* are present in many of them.[6]

More recently, the Court of Claims interpreted the Court's footnote in *Taylor* as holding that "[t]he party need not have an express agreement to be bound; implied agreement and conduct inducing reliance are also sufficient to constitute an agreement for the purposes of this type of non-party preclusion," and observing that "[t]his type of nonparty preclusion is well-established and is common in the federal courts." *Bartels Trust v. United States*, 88 Fed. Cl. 105, 113 (2009). Thus, the Sixth Circuit's decision, if allowed to stand, will have far-reaching adverse consequences on persons who, although not parties to prior litigation, will be barred from having their own day in court nevertheless. This case presents a dramatic example of why this Court needs to take up the reserved question now.

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[5] *See Wilks*, 490 U.S. at 762 n.3.

[6] *See, e.g , Corley v. Jackson Police Dep't*, 755 F 2d 1207, 1209 (5th Cir. 1985)("[T]o allow plaintiff to attack the decree at this late point would severely undercut important notions of judicial efficiency and finality of judgment, and would unfairly prejudice other parties and nonparties ")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Stephen P. Samuels
Counsel of Record
Nicole R. Woods
SCHOTTENSTEIN, ZOX & DUNN, CO., LPA
250 West Street
Columbus, OH 43215
T: (614) 462-2700
ssamuels@szd.com

Patricia A. Millett
AKIN, GUMP, STRAUSS, HAUER &
FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
T: (202) 887-4450

R. Guy Taft
Franklin A. Klaine, Jr.
Joseph J. Braun
STRAUSS & TROY
Federal Reserve Building
150 East Fourth Street
Cincinnati, Ohio 45202
T: (513) 621-2120